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Nos. 99-1687 and 99-1728

Supreme Court, U.S.
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In The

Supreme Court of the United States

THE UNITED STATES OF AMERICA,

Petitioner,

vs.

FREDERICK W. VOPPER, et al.,

Respondents.

GLORIA BARTNICKI and ANTHONY F. KANE, JR.,

Petitioners,

vs.

FREDERICK W. VOPPER, a/k/a FRED WILLIAMS; KEY MARKET OF NEPA, INC., d/b/a WILK RADIO; LACKAZERNE, INC., d/b/a WGBI RADIO; JACK YOCUM, et al.,

Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the First Amendment preclude imposition of Civil Damages for disclosure of a tape recording of an intercepted telephone conversation which contains information of a newsworthy nature and contains threats of violence when the Defendants, consisting of two radio stations, a radio personality and an individual, who received the tape recording anonymously and furnished the tape recording to the media defendants, played no direct or indirect roll in the interception.

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STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

Jack Yocum, an adult individual, was the president of the Wyoming Valley West Taxpayers Association, an organization which was opposed to the Teachers Union Bargaining Proposals with the Wyoming Valley West School District. The Petitioners, Gloria Bartnicki and Anthony F. Kane, Jr. ("Bartnicki and Kane"), were actively involved in the negotiation of the new Wyoming Valley West Teacher's contract. Anthony F. Kane, Jr., a teacher at the Wyoming Valley West High School, was president of the Union and Gloria Bartnicki was employed by the Pennsylvania State Education Association (PSEA), the teacher's union, which provided support services and assistance to PSEA affiliates representing personnel at various public school districts.

In May of 1993, a conversation occurred between Bartnicki and Kane. It is alleged that Kane was speaking on a conventional telephone while Bartnicki was in her car using a cellular telephone. During their conversation, Kane stated:

> "If they're not going to move for three percent, we're gonna have to go to their homes. . . . to blow off their front porches, we'll have to do some work on some of those guys. . . . Really, uh, really and truthfully, because this is, you know, this is bad news (undecipherable) The part that bothers me, they could still have kept to their three percent, but they're again negotiating in the paper. This newspaper report knew it was three percent. What they should have said, 'we'll meet and discuss this.' You don't discuss the items in public." (U.S. Pet. Appendix at 3a)

Kane was referring to members of the school board who he had felt had been negotiating in the paper by telling reporters what the Board's position was relative to a pay increase for the teachers.

The conversation was somehow intercepted and recorded onto a tape, which was given to Jack Yocum, anonymously, by someone or some others who had placed it in his mailbox. (U.S. Pet. Appendix at 3a) Yocum had listened to the tape and, and shortly thereafter, concerned with the bomb threats made thereon, gave a copy of the tape to the Respondent, Frederick W. Vopper, a/k/a Fred Williams, who kept the tape. However, the tape was not played until some four months later when, on or about September 30, 1993, Frederick W. Vopper played the tape in its entirety on his talk show carried by radio station WILK and WGBI. Although other news media outlets had either aired part of the tape or had published transcripts of same, these media outlets were not named as defendants in a civil suit subsequently brought by Kane and Bartnicki v. Yocum, Fred Vopper, WILK, WGBI, and their parent companies, Keymarket of Nepa, Inc. and Lakazerne, Inc. (U.S. Pet. Appendix at 4a)

Though extensive discovery had been taken after institution of the law suits, it was never determined who intercepted the tape, how same was intercepted or for what purpose it was intercepted. No one disputes the fact that Jack Yocum received the tape anonymously in his mailbox and did not take part in the interception or taping of the conversation.

Kane and Bartnicki brought law suits under both the Federal and State Statutes regulating wire tapping. The

Federal Statute located at 18 U.S.C. §§ 2511 *et seq.* and the Pennsylvania Statute located at 18 Pa. C.S.A. §§ 5703 *et seq.* ("wiretap statutes") both provide for criminal and civil liabilities for the interception, disclosure, and publication of wire, oral or electronic communications.

The Federal District Court for the Middle District of Pennsylvania, after the close of Pleadings and Discovery, denied Summary Judgment to all parties. Further, the District Court denied Summary Judgment after reconsideration. The District Court then certified two (2) questions for Appeal pursuant to 28 U.S.C. § 1292(b). Those questions were: (1) whether the imposition of liability on the media Defendants under the wiretapping statutes solely for broadcasting the newsworthy tape . . . , when the tape was illegally intercepted and recorded by unknown persons who were not agents of the Defendants violates the First Amendment; and (2) whether imposition of liability under the aforesaid wiretapping statutes on Defendant, Jack Yocum, solely for providing the anonymously intercepted and recorded tape to the media Defendant violates the First Amendment. (Bartnicki and Kane Pet. at 9) After oral argument and after the United States ("Government") was granted the right to intervene and the PSEA was granted leave to file an Amicus Curiae Brief, the Third Circuit on a two to one vote reversed the District Court's Order denying Summary Judgment to the Defendants.

After Motions for rehearing and suggested rehearing en banc, by Bartnicki and Kane and by the Government were denied, the instant petitions for Writ of Certiorari

were filed on behalf of Bartnicki and Kane and the Government.

REASONS FOR DENYING THE WRIT

Certiorari should be denied because the decision below does not conflict with a recent decision of the District of Columbia Circuit, does not strike down provisions of both a federal and state statute and does not incorrectly decide important question of constitutional law reserved by this Court in previous decisions.

A. The decision below does not conflict with the decision of the District of Columbia Circuit in *Boehner v. McDermott*. Petitioners would have the Court believe that the facts in *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999) are indistinguishable from the facts in the instant case.

There are marked differences in the cases. In the *Boehner* case, Representative James McDermott, although he had not participated in the interception of any communications, accepted a tape from a couple, the Martins, who had intentionally intercepted a conference call in which Representative John Boehner participated via a cellular telephone. In that call, then Speaker of the House, Newt Gingrich engaged in conduct alleged to have violated an agreement he had recently made with the House Ethics Committee. The Martins taped the call and delivered same to McDermott. McDermott was then a ranking democratic member of the Ethics Committee. McDermott accepted the tape from these individuals knowing they had illegally intercepted the call. McDermott used the

tape for for his own political gain by giving a copy to the New York Times. Additionally, McDermott sought immunity for the Martins from criminal prosecution for intercepting the tape. Representative Boehner sued McDermott, but did not sue the New York Times. McDermott, as the Third Circuit correctly recognized, knew his participation was illegal when he entered into it. (U.S. Pet. Appendix at 40a quoting decision in *Boehner v. McDermott*, 191 F.3d at 479). In the case at bar, Yocum was not in the same position as McDermott. Yocum was an innocent conduit when he received the recorded tape. (U.S. Pet. Appendix at 40a-41a). Additionally, the heightened public interest and the newsworthiness of the conversation between Kane and Bartnicki are obvious. (U.S. Pet. Appendix at 37a). The Third Circuit recognized this in its decision. Additionally, there were threats of acts of violence contained on the tape and the Third Circuit recognized that nothing in the context of the conversation suggested that it was said in anything other than a serious vein. (U.S. Pet. Appendix at 36a). In addition, the fact that the President of the School Teacher's Union would make this suggestion was considered by the Third Circuit to be highly newsworthy and of public significance. (U.S. Pet. Appendix at 36a-37a). Additionally, the D. C. Circuit clearly indicated that its decision was based on the facts of that case only and limited in scope. (191 F.3d at 478) (U.S. Pet. Appendix at 43a-45a, footnotes 1 & 2).

B. The decision below does not strike down important provisions of a Federal Statute and does not call into question the constitutionality of Statutes enacted by a majority of the states. The Third Circuit decision in this

case does not invalidate the subject statutes. Wiretapping still is punishable both civilly and criminally. The Third Circuit decision in this case is limited to the unique facts and questions presented to the Court. It does not have the far-reaching and broad effect that the Petitioners would like the Court to believe. The question answered by the Third Circuit is a very narrow one and the Court's analysis of this case is in keeping with the approach stated by the Supreme Court in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), in that the Third Circuit's decision is limited to the unique facts and circumstances of this case.

C. The decision below does not decide incorrectly an important question of constitutional law that has been reserved by this Court in previous decisions. The Third Circuit correctly analyzed the decisions of the United States Supreme Court in four (4) cases where this Court had concluded that State attempts to punish or deter the Press's publication of truthful information was unconstitutional. These cases all involve the balancing of privacy interests against First Amendment rights. In each case, the Court came down on the side of the First Amendment. Both Petitioners refer to *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) and *Florida Star v. B.J.F.*, 491 U.S. 524 (1989). In each of these cases, the Court held in favor of the First Amendment (Government Pet. Appendix, at 12a-13a).

The Third Circuit correctly adopted the position previously taken by the Supreme Court in cases of this nature, in that, the Court will apply First Amendment principles to the unique facts and circumstances of the

case. (U.S. Pet. Appendix at 14a). As the Supreme Court stated in *Florida Star,*

> "we continue to believe that the sensitivity and significance of the interest presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case." (U.S. Pet. Appendix at 14a).

The Petitioners in this case would like the Court to think that the decision of the Third Circuit is far broader than it really is. In point of fact, the Third Circuit followed the Supreme Court's approach to deciding cases of this nature by restricting its decision to the facts and circumstances of the case at bar. Therefore, the Petitioner's argument that the Third Circuit decision decides incorrectly an important question of Constitutional Law that has been reserved by the Supreme Court in previous decisions is incorrect.

The two wiretap statutes in question will still effectively protect people from the interception and improper publication of their conversations. The Third Circuit's decision will not render the subject statutes inapplicable or inoperative.

CONCLUSION

The Petitions for a Writ of Certiorari by United States of America and Gloria Bartnicki and Anthony F. Kane, Jr. should be denied.

Respectfully submitted,

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